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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5780

HOYT WEAVER, *Petitioner*,

v.

ROBERT GRAHAM, Governor of Florida, *Respondent*.

On Writ of Certiorari to
The Supreme Court of Florida

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion below, a per curiam memorandum decision, is reported at 376 So.2d 855 (Fla. 1979). It denied relief to petitioner on authority of *Harris v. Wainwright*, 376 So.2d 855 (Fla. 1979), a companion case decided on the same date.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on November 1, 1979. The petition for certiorari was filed on December 13, 1979 and granted as to Question One on March 17, 1980. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following federal constitutional provision is involved: "No State shall... pass any...*ex post facto* law." U.S.CONST. art. I, § 10, Cl. 1. The following state constitutional provision is involved: "No...*ex post facto* law...shall be passed." Fla.CONST. art. I, § 10. Several Florida statutes, notably § 944.27, F.S. (1975), and § 944.275, F.S. (1979), are involved. Those statutes in their entirety are

reproduced in the appendix to this brief.

QUESTION PRESENTED

WHETHER § 944.275, F.S. (1979), AS APPLIED TO PETITIONER, IS AN *EX POST FACTO* LAW.

STATEMENT OF THE CASE

Procedural History

The allegations under this subheading as set forth in petitioner's brief are substantially correct and will be accepted by respondent with the exception of the argumentative statement on p. 6 as follows: "The change now challenged lies in the dramatic reduction in the opportunity to acquire gain time for good conduct and thus procure a reduction in sentence." Although for different reasons, respondent agrees that this case can have dramatic repercussions for the numerous prisoners presently incarcerated in the Florida

penal system (petitioner's brief, p. 6, n. 6).

It is not surprising at all that the Florida Supreme Court in deciding *Harris v. Wainwright*, 376 So.2d 855 (Fla. 1979), did not discuss its prior holding in *Lee v. State*, 294 So.2d 305 (Fla. 1974). In *Lee*, the Florida Supreme Court clearly recognized that at a resentencing, the penalty provisions in effect at the time of the offense must be applied because to apply the penalty provided in the post-offense amendatory legislation would have required the defendant to serve a twenty-five year prison term before becoming eligible for parole and would be an *ex post facto* application and hence unconstitutional. The opinion in *Lee* illustrates the court's clear understanding of the nature of an *ex post facto* law, i.e., a

law which exposes a defendant to a greater penalty than that which originally could have been imposed at the time of the commission of the offense. 294 So.2d at 307. It would have been surprising if the court had discussed in *Harris v. Wainwright, supra,* its holding in *Lee* because the legislation with which the *Harris* court was concerned did not deprive the defendant of any protectible interest previously earned nor did it expose him to any greater penalty than that which could have been imposed at the time of the commission of the offense.

The Nature of Gain-Time

Gain-time or good-time as it is often called does not reduce the period of the original sentence but often has the effect of determining how much of that sentence must be spent within the confines of the

prison. *McKinney v. Taylor*, 358 F.2d 689 (10th Cir. 1966). Gain-time or good conduct statutes are framed with the intention of improving prison discipline. The allowance of gain-time or good-time credits is said to be in the nature of a payment or reward by the State to the prisoner for his good behavior. The purpose is to stimulate the prisoner to conform to the rules of the institution and to avoid the commission of crimes during his imprisonment. Such statutes must be viewed as being prompted by the highest motives of humanity and are generally looked on with favor. As stated by the court in *Mayo v. Lukers*, 53 So.2d 916 (Fla. 1951): "The ends to be obtained are the reform and rehabilitation of the prisoner and his return to and discharge of his duties to society." *Id.* at 917.

Statutes providing for gain-time credits are sometimes said to classify themselves generally into two groups. In the first group are those statutes which automatically reduce the period of imprisonment. This type of legislation forms a part of the judgment and the prisoner begins the service of his original sentence with the statutory assurance that the term thereof will be automatically abridged by law, unless by his own breach of prison discipline *he forfeits the credits which inhere in his sentence*. Under a statute of this first class, the presumption is in favor of the prisoner and the burden is on the State to show affirmatively the facts which defeat the claim to statutory allowances.

In the second group are those statutes which determine in advance the amount of gain-time which certain prisoners *may*

earn if certain specified terms and conditions are met. Under this type of statute, the gain-time is held out as a reward for good conduct or efficiency in prison labor. This type of statute cannot enter into the sentence or form a part of it because the reward *must first be earned before the prisoner is entitled to it. Stephens v. Conley*, 138 P. 189 (Mont. 1914).

By the express terms of the challenged statute, a prisoner is entitled to an award of statutory gain-time only when it is earned. This is the definitive construction placed on the statute by the Florida Supreme Court, *Harris v. Wainwright, supra,* and is binding on this Court as to what the statute means. *Wainwright v. Stone*, 414 U.S. 21, 38 L.Ed.2d 179, 94 S.Ct. 190 (1973); and *Miller v.*

California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973).

The Requisites of an *Ex Post Facto* Law Reexamined

Traditionally an *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed or a punishment in addition to that then prescribed. A statute belongs to the class of *ex post facto* laws when, *by its necessary operation, and in its relation to the offense, or its consequences*, alters the situation of the accused to his disadvantage. It follows that a law which alters punishment or inflicts a greater punishment than did the law annexed to the crime when committed is *ex post facto*. *United States ex rel. Forino v. Garfinkel*, 166 F.2d 887 (3d Cir. 1948); *Government of Virgin*

Islands v. Civil, 591 F.2d 255 (3d Cir. 1979).

There is respectable authority supportive of the premise that the constitutional prohibition against *ex post facto* laws applies only to changes in substantive law and not to changes in procedure. *Donald v. Jones*, 445 F.2d 601 (5th Cir. 1971), *cert.denied*, 404 U.S. 992; *James v. Twomey*, 466 F.2d 718 (7th Cir. 1972). Case law teaches that the *ex post facto* prohibition does not apply unless the statute is criminal or penal. *Doris v. Police Com'r of Boston, Mass.*, 373 N.E.2d 944 (Mass. 1979); *Agustin v. Quern*, 461 F.Supp. 441 (D.C.Ill. 1978).

It can be said that the constitutional ban on *ex post facto* laws reaches every law which makes criminal an act done before its enactment which was legal

when performed; every law that aggravates a crime or makes it greater than it was when committed; every law that changes the punishment and inflicts a greater punishment *than the law affixed to the crime when committed;* and every law that alters the legal rules of evidence and requires less or different evidence to convict than the law required at the time of the offense or otherwise, *by a change in the law in relation to the offense or its consequences* that alters the situation of a party to his disadvantage. *Breest v. Helegemoe,* 579 F.2d 95 (1st Cir. 1978), *cert.denied,* 439 U.S. 933; *State v. Bunn,* 440 P.2d 528 (Haw. 1968).

SUMMARY OF ARGUMENT

Application to petitioner of the new gain-time statute does not violate the *ex post facto* prohibition. The statute does not operate retrospectively and is not aimed at any prior act of petitioner. The challenged statute is applicable to all prisoners as of its effective date, July 1, 1978. The statute does not impose greater punishment because the gain-time provided for therein is no part of the original sentence and thus no part of the punishment annexed to the crime at the time petitioner was sentenced.

The challenged statute does not alter petitioner's situation to his disadvantage, nor does it impose unpleasant consequences upon him for prior conduct. The unpleasant consequences were visited upon

petitioner at the time of his sentencing and the challenged statute was no part thereof. Indeed, neither was § 944.27, F.S. (1975), any part of those unpleasant consequences because it too was no part of the punishment inflicted on petitioner at his sentencing. The new gain-time statute is remedial in nature and procedural in determining how prisoners can accumulate gain-time. The challenged statute cannot be *ex post facto* because it is less onerous than the prior law in effect at the time petitioner was sentenced.

Petitioner does not have a constitutionally protected liberty interest bottomed on a hope or expectation of gain-time yet to be earned. No court, including this one, has extended the reach of the Due Process Clause to this

extent in order to find a protectible right under existing law. A prisoner clearly must have more than an abstract need or desire for whatever it is he wants. He must have more than a unilateral expectation of it. He must instead have a legitimate claim of entitlement to it. *Board of Regents v. Roth*, 408 U.S. 564, 577, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972). Petitioner has no legitimate claim of entitlement to gain-time until it is earned and it is then and only then that he must be credited therewith.

ARGUMENT

WHETHER § 944.275, F.S. (1979), AS APPLIED TO PETITIONER, IS AN *EX POST FACTO* LAW.

Petitioner complains that he is deprived of gain-time by an *ex post facto*

law. In essence, it is *claimed* that since § 944.275, F.S., effective July 1, 1978 (hereinafter second statute or new statute), permits the accumulation of a lesser amount of gain-time or "good time" than did its predecessor, § 944.27, F.S. (1975) (hereinafter first statute or old statute), the application of the new statute to petitioner in the computation of his gain-time makes the statute an *ex post facto* law because it was not in effect at the time petitioner was convicted and sentenced. This precise issue was rejected by the Florida Supreme Court in *Harris v. Wainwright*, 376 So.2d 855 (Fla. 1979).

Remedial and/or Procedural
Aspects of the Challenged Statute

The statute challenged in this proceeding does not operate retrospectively. The

statute became applicable to all prisoners incarcerated in the Florida penal system on July 1, 1978 and operates prospectively only. The statute is not *ex post facto* legislation because it does not apply a new punitive measure to a crime already consumated to the detriment or material disadvantage of the wrongdoer. This is a necessary ingredient to an *ex post facto* claim. *Dobbert v. Florida*, 432 U.S. 282, 53 L.Ed.2d 344, 97 S.Ct. 2290 (1977).

The statute is remedial and constitutes a procedural change in the statutory mechanism designed for the purpose of granting gain-time to deserving prisoners. The constitutional prohibition against *ex post facto* laws does not limit the legislative control of remedies and modes of procedure. *Beazell v. Ohio*, 269 U.S.

167, 169-171, 70 L.Ed. 216, 46 S.Ct. 68 (1925). Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*. *Hopt v. Utah*, 110 U.S. 574, 28 L.Ed. 262, 4 S. Ct. 202 (1884); *Thompson v. Missouri*, 171 U.S. 380, 43 L.Ed. 204, 18 S.Ct. 922 (1898). In the case at hand, the new statute is clearly procedural. Section 944.012 (6)[1] contains a statement of legislative intent in enacting The Florida Corrections Code of 1957, Ch. 944, F.S.A. The following language from *Hopt v. Utah, supra*, summarizes respondent's position that the new gain-time statute is procedural and thus not a violation of the Ex Post Facto Clause:

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[1] § 944.012, F.S. (1979), is reproduced in its entirety in the appendix to this brief.

> "The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute."

110 U.S. at 589-590.

In the statement of the question presented (petitioner's brief, p. 3) and in the prefatory remarks to his argument (petitioner's brief, p. 15), it is urged that the challenged statute "altered the situation of petitioner to his disadvantage." A comparison of § 944.27, F.S. (1975), in effect at the time petitioner was convicted on May 13, 1976 (petitioner's brief, p. 3), and the new gain-time statute, § 944.275, F.S. (1979), will show the fallacy of this assertion.

The old statute in effect at the time petitioner was convicted provided the opportunity to earn five days gain-time

per month during the first and second years of the sentence; ten days per month during the third and fourth years of the sentence; and fifteen days per month during the fifth and all succeeding years of the sentence. The statute had no provision for the accumulation of work gain-time in addition to the statutory gain-time; no provision providing for gain-time allowances because of age, illness, infirmity, or confinement for reasons other than discipline; no provision for the allowance of gain-time to a prisoner who performs his assignments in a conscientious manner over and above that which may normally be expected of him; nor any provision for the allowance of gain-time to a prisoner who performs some outstanding deed. To summarize, the only gain-time allowances provided in the old

statute are set forth in subsection (1)(a), (b), and (c) in the fixed amounts of 5-10-15 as above stated.

In comparison, the new gain-time statute challenged in this proceeding, while reducing the fixed amount of calendar statutory gain-time from 5-10-15 to 3-6-9, by virtue of additional provisions provides opportunity for a greater accumulation of gain-time than did the old statute. For example, the new statute at subsection (2)(b) authorizes the grant of additional gain-time allowances on a monthly basis, as earned, up to one day for each day of productive or institutional labor performed by any prisoner who has committed no infraction of the rules or laws of the State. This is popularly known as the work gain-time statute and was enacted for the purpose of

encouraging good behavior of prisoners participating in work-release programs. The old gain-time statute had no provision for the accumulation of work gain-time.

The new statute at subsection (2)(e) permits the accumulation of up to six days per month for any inmate who, because of age, illness, infirmity, or confinement for reasons other than discipline, does not participate in a correctional work program. This means that a prisoner who is unable to participate in a work release program can still accumulate gain-time. No comparable provision is found in the old statute.

The new statute at subsection (3)(a) permits the accumulation of gain-time by a prisoner who performs the assignments given to him in a conscientious manner

over and above that which may normally be expected of him where no disciplinary report has been filed against such prisoner within the preceding six months. This particular subsection also permits the accumulation of gain-time by a prisoner "who diligently participates in an approved course of academic or vocational study." The quoted language means that a prisoner may accumulate gain-time while participating in an educational program. However, the old statute as it stood at the time of petitioner's conviction had no comparable provision. Interestingly, the legislature with the passage of Ch. 76-273, Laws of Florida 1976, added subsection (3) to the old statute which specifically excluded the allowance of gain-time for participation in academic classroom instruction. *See* § 944.27, F.S.

(1977).

The new statute at subsection (3)(b) authorizes the granting of gain-time to a prisoner who performs some outstanding deed or service. The old statute, §944.27, contains no comparable provision. Thus, it becomes obvious that under the old statute at subsection (1)(c) the most gain-time that petitioner could accumulate was fifteen days per month during the fifth and subsequent years of his sentence. Under the new statute at subsection (1)(c), petitioner may accumulate nine days gain-time per month during the fifth and succeeding years of his sentence; in addition thereto, he may accumulate up to fifteen days per month work gain-time under the provisions of subsection (2)(b). However, if petitioner, because of illness or other infirmity, is unable to

participate in a correctional work program, he still can accumulate up to six days gain-time per month when he demonstrates a constructive utilization of time and has committed no infraction of the rules or laws of the State. Under subsection (3)(a), petitioner may accumulate up to six days per month extra gain-time just for diligently participating in an approved course of academic or vocational study. Under subsection (3)(b) of the new statute, petitioner can be granted special gain-time from 1 to 60 days. Simple arithmetic shows that petitioner's opportunity for the accumulation of gain-time under the new statute far surpasses that which he could have earned under the old statute. It is obvious that the new statute is a legislative attempt to remedy some of the inequities of the old statute

looking toward the ultimate goal of rehabilitation of the prisoner. The new statute encourages industry because of the opportunities it affords for the accumulation of gain-time whether same be termed statutory, work, or discretionary gain-time. Under the old statute, the maximum amount of gain-time that could be earned was fixed and all any prisoner had to do in order to be credited with the appropriate amount of gain-time at the end of each month was to stay out of trouble. This encourages laziness and discourages prisoner industry and initiative. In summary, the new statute is remedial; it is procedural; and it is ameliorative. The applicable rule was well stated by this Court in *Dobbert:* "It is axiomatic that for a law to be *ex post facto* it must be *more onerous* than the prior law." 53 L.Ed.2d at 357.

It is repeatedly urged in petitioner's brief that the other provisions of the new statute, to-wit: the monthly earning provision and the extra gain-time provisions provided for in subsections (2)(b)-(3)(b) are "not material" (petitioner's brief, p. 5; n. 7 at p. 9) and "of no consequence." (petitioner's brief, p. 6) This attempt to separate portions of a comprehensive piece of remedial legislation is a tacit admission that if the statute is analyzed in its entirety, as it should be, *State ex rel. Boyd v. Green*, 355 So.2d 789 (Fla. 1978), then the assumption contained within the "Question Presented" (petitioner's brief, p. 3), essential to petitioner's case, that the new statute reduces substantially the right to acquire gain-time, must fail. Of course, petitioner cannot admit that he has an

opportunity to earn more gain-time under the procedural requirements of the new statute because if he does, then he cannot prevail on his *ex post facto* claim. *Dobbert v. Florida, supra.* The best evidence that a prisoner can accumulate more gain-time under the new statute than the old is that numerous prisoners have sought and obtained mandamus orders to recompute their gain-time under the new statute. Illustrative of this type of order[2] is the one entered in *Storm v. Massey,* No. 00-128 (Fla. 1st DCA, 1979), not reported. Query: would prisoners seek this type of relief if they were of the opinion it would result in a loss of gain-time? We think not.

Petitioner notes that this proceeding

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[2] The order (formal parts omitted) is reproduced in the appendix to this brief.

is not a class action. While this is true, should this Court conclude that gain-time is in some way related to the punishment annexed to the crime and that the change wrought by the new statute constitutes *ex post facto* legislation, then under Florida's constitution work gain-time and any other gain-time awarded under § 944.275 to prisoners convicted prior to its enactment would be lost. *See* FLA.CONST. art.X, § 9. This impact is clearly understood by counsel for petitioner. See petitioner's brief, p. 6, n.6.

The schematics presented on p. 7 of petitioner's brief is interesting more for what it does not show than what it does. Petitioner wants this Court to believe that the passage of the new statute materially altered his position to

his disadvantage. Then we wonder why no allegation is found in petitioner's brief showing the total amount of gain-time earned subsequent to July 1, 1978 and particularly the amount of gain-time, exclusive of statutory gain-time, that he has earned since that date. Could it be--could it just be--that petitioner really isn't interested in furnishing the Court with this information? After all, if the Court had this information, it might conclude that the application of the new statute did not work to the *material* disadvantage of petitioner. It is even possible the Court might conclude that petitioner has accumulated gain-time under the new statute that he could never have acquired under the old. The simple truth is that the new statute has placed petitioner in a materially better position

than he was prior to the time of its passage. This is so because a reading of the statutes will reveal that benefits inuring to petitioner under the new statute could not have been had under the old statute.

THE EX POST FACTO CLAIM

It is appropriate to begin the discussion of this issue by pointing out that petitioner is incarcerated pursuant to a lawful judgment and sentence which he does not attack. *See United States v. Addonizio*, 442 U.S. 178, 68 L.Ed.2d 805, 99 S. Ct. 2235 (1979); *Banks v. State*, 342 So.2d 469 (Fla. 1976). It must be admitted that lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a "retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334

U.S. 266, 285, 92 L.Ed. 1356, 68 S.Ct. 1049 (1948). This is not to say that a prisoner is wholly stripped of constitutional protections when imprisoned for crime. Far from it! But the fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the system to which they have been lawfully committed. *Cf. CSC v. Letter Carriers,* 413 U.S. 548, 37 L.Ed.2d 796, 93 S.Ct. 2880 (1973); *Parker v. Levy,* 417 U.S. 733, 41 L.Ed.2d 439, 94 S.Ct. 2547 (1974); *Broadrick v. Oklahoma,* 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973). It is in this posture that petitioner's claim of a deprivation of unearned gain-time must be viewed. Stated another way, petitioner claims that § 944.275, F.S. (1979), deprives him of a

constitutionally protected liberty interest in unearned gain-time.

An *ex post facto* claim was raised in *Trantino v. Department of Corrections*, 402 A.2d 947 (N.J.Super.Ct. 1979). It was urged that the Department of Corrections' action in changing Trantino's best estimated parole eligibility date offended the constitutional prohibition against the imposition of *ex post facto* laws. In refuting this claim, the New Jersey court remarked as follows:

> "Trantino had no vested right in the September 1977 BEPED and the fact that it was subsequently changed does not present an issue of constitutional magnitude requiring our interference. As Judge Goldmann so aptly observed in *Zink v. Lear, supra,*
>
> > Parole presents a question of statutory construction; no constitutional right is involved. * * * Parole is a matter of legislative grace and not a thing of right. * * * Parole may be granted or withheld, as the legislative discretion may impel. When sentence is imposed upon a defendant, there is no constitutional guaranty that the provisions regarding parole will remain constant; the only constitutional inhibition is

> that no law may be passed increasing the punishment for the crime committed. * * * The changes effected by the 1948 Parole Act and its amendments imposed no new penalty nor did they increase the sentence for the crime. The act simply changed the procedure of administering parole and bears none of the elements requiring condemnation as abrogating the prisoner's constitutional rights. [28 N.J.Super. at 524-525, 101 A.2d at 77; citations omitted]
>
> See also, *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed. 2d 344 (1977); *DiMiceli v. State Parole Board*, 29 N.J.Super.80, 101 A.2d 580 (App.Div. 1953), aff'd o.b. 15 N.J. 446, 105 A.2d 525 (1954)."

Id. at 951, 952.

In *Singleton v. Shafer*, 313 F.Supp. 1094 (E.D.Pa. 1970), it was urged that the statute which repealed the so-called "good time" statute in Pennsylvania violated the prisoners' constitutional rights because it was a bill of attainder. Judge Luongo addressed the issue as follows:

> "Commonwealth ex rel. Banks v. Cain, *supra*. Commutation under the 'good-time' statute ultimately depended upon the exercise of the Governor's discretion; it was a matter of executive grace. There was no vested right in having a sentence reduced even if all other conditions set forth in the statute had been fulfilled, i.e., good behavior and approval of the board of inspectors. See United States ex rel. Forino v. Garfinkel, 166 F.2d 887 (3d Cir. 1948); In re Raymond, 110 F. 155 (E.D.Pa.1901). The statute merely set forth a particular ground for executive clemency. Since a prisoner was subject to the maximum sentence and commutation was solely a matter of executive grace, there was and is no vested right in the continuing existence of the statute. Under these circumstances repeal of the statute did not constitute imposition of punishment without a judicial trial nor did it constitute an *ex post facto* law inflicting greater punishment. See United States ex rel. Forino v. Garfinkel, *supra*."

Id. at 1095, 1096. *See also Graham v. Thompson*, 246 F.2d 805 (10th Cir. 1957).

Petitioner adroitly points out that

Graham v. Thompson, supra, was viewed with disfavor by the Third Circuit in *Geraghty v. United States Parole Commission,* 579 F.2d 238, 266, n. 136 (3rd Cir. 1978). This is of no consequence because *Gerahty* cannot be read as supportive of petitioner's contention that he has a constitutionally protected liberty interest in unearned gain-time. In fact, respondent knows of no decision by this Court or any other court that has held that a prisoner has a constitutionally protected liberty interest in, not gain-time already earned and thus vested, but in an expectancy of earning such gain-time in the future.

In a somewhat similar context, this Court pointed out in *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 60 L.Ed.2d 668, 676, 99 S.Ct. 2100 (1979), that "[t]here is a crucial distinction between being

deprived of a liberty one has, as in parole and being denied a conditional liberty that one desires." The Court further commented that a prisoner has no constitutional right to be conditionally released before the expiration of a valid sentence. Of course, any prisoner has a natural desire to be released from prison. He didn't want to go there in the first place. But his conviction with all its procedural safeguards has extinguished that liberty right. In other words, the prisoner's desire to be conditionally released does not constitute a constitutionally protected liberty interest. *Meachum v. Fano*, 427 U.S. 215, 224, 49 L.Ed.2d 451, 96 S.Ct. 2532 (1977).

Just as there is a difference between an initial grant of parole and the revocation of that parole, there is a

difference between the right or opportunity to earn gain-time conditioned on good behavior and the revocation or forfeiture of such gain-time already earned and credited to a prisoner. This distinction is pointed out in *United States ex rel. Bey v. Connecticut Board of Parole*, 443 F.2d 1079, 1086 (2d Cir. 1971), as follows:

> "It is not sophistic to attach greater importance to a prisoner's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom."

Similarly, and with equal logic, it can be said that a prisoner's right to retain gain-time already earned so long as he abides by the rules of the institution in which he is incarcerated is of much greater importance than his mere anticipation or hope of earning gain-time in the future. As Judge Friendly cogently noted: "[T]here

is a human difference between losing what one has and not getting what one wants." *Friendly, Some Kind of Hearing,* 123 U.Pa. L.Rev. 1267, 1296 (1974). It is emphasized that petitioner does not complain of being deprived of gain-time already earned but objects to being deprived of his hope of earning a given amount of gain-time in the future.

In determining whether due process requirements are applicable to petitioner's claimed deprivation of a liberty interest, it is believed this Court must look not to the weight but to the nature of the interest at stake. *Board of Regents v. Roth,* 408 U.S. 564, 570-571, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972). Under the old statute, respondent held out the possibility, the hope, of earning gain-time in the future at a given rate. But this

is nothing more than a mere hope or expectation that such gain-time can be earned. *Cf. Board of Regents v. Roth, supra,* 408 U.S. at 577. To that extent, petitioner's general interest in the accumulation of unearned gain-time is no more substantive than his hope that he will not be transferred to another prison, a hope which is not protected by due process. *Meachum v. Fano,* 427 U.S. at 225. While *Greenholtz* deals with a protected liberty interest in a parole context, the Court's opinion clearly points up the distinction respondent makes herein, i.e., the difference between being deprived of gain-time a prisoner has already earned and being denied the hope or possibility of earning gain-time in the future. In fact, however, the new statute, as previously emphasized, affords petitioner the very

real opportunity of earning a greater amount of gain-time than he could have earned under the old statute. In a similar context, the Fifth Circuit in *Brown v. Lundgren*, 528 F.2d 1050, 1053, (5th Cir. 1976), pointed out that parole revocation and prison discipline are clearly within the ambit of the Due Process Clause of the Fifth and Fourteenth Amendments. But with equal emphasis the court stated that "the mere expectation of parole release while in otherwise lawful custody is not so vested as to result in a 'grievous loss' if denied by the Parole Board." The applicability of this principle *sub judice* is inescapable: petitioner's *expectation* of earning gain-time at a given rate is not so vested as to result in a grievous loss when, as he claims, it is denied by the enactment of a new statute.

This Court's decision in *Wolff v. McDonnell*, 418 U.S. 539, 41 L.Ed.2d 935, 94 S.Ct. 2963 (1974), is informative. There, the Court held that federal courts may consider the validity of procedures for *depriving prisoners of good-time credits* and may, short of ordering the actual restoration of good-time already cancelled, fashion appropriate remedies for any constitutional violations. The primary concern of the Court was the protection against loss of good-time already earned because of a prisoner's major or serious misconduct. The Court noted that, although the Constitution does not guarantee good-time credit for satisfactory behavior while in prison, it emphasized that the State had provided a statutory right to good-time but also specified it was to be forfeited only for serious

misbehavior. 418 U.S. at 557. Thus, the State having created the right to good-time and recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest is sufficiently embraced within the Fourteenth Amendment "liberty" to entitle him to minimum due process protection to ensure that the state-created right is not arbitrarily abrogated. 418 U.S. at 557. The Court is here speaking to the possibility of arbitrary forfeiture of good-time credits without requisite due process protection. The following language highlights the Court's intent that the minimum requirements of procedural due process be observed before a Nebraska prisoner is deprived of good-time credits for serious misconduct:

> "Since petitioners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination

> of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed."

418 U.S. at 558. Respondent agrees that before a prisoner can be deprived of good-time already earned because of serious misconduct, minimum due process standards must be observed because the prisoner has a protectible Fourteenth Amendment liberty interest in such gain-time already earned. Florida law protects prisoners against the arbitrary forfeiture of gain-time without the observance of minimum due process. *See* § 944.28, F.S. (1979). For additional holdings that a prisoner does not have a protectible liberty interest in a future parole release, *see Sharp v. Leonard*, 611 F.2d 136 (6th Cir. 1979); *Jackson v. Reese*, 608 F.2d 159 (5th Cir. 1979). In this

connection, if petitioner is heard to argue that the cases relied on by respondent are not necessarily *ex post facto* cases, then the following quoted from the opinion in *Jackson* may be of interest:

> "The threshold question under § 1983 is whether the complainant has been deprived of a cognizable liberty or property interest. The Supreme Court has held that the denial of parole, as distinguished from the revocation of parole, does not amount to a loss of liberty in the due process context. *Greenholtz v. Nebraska Penal Inmates*, ___ U.S. ___, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979); *Brown v. Lundgren*, 528 F.2d 1050 (5th Cir. 1976), *cert. denied*, 429 U.S. 917, 97 S.Ct. 308, 50 L.Ed.2d 283. Since appellant has not shown a deprivation of a constitutionally protected interest, this Court need not address whether the Georgia Parole Board's procedures comport with due process. *Id.* at 1053."

Id. at 160. It is the position of respondent that since petitioner has not shown any deprivation of a constitutionally protected liberty interest, the Court need

not address the issue of whether Florida's new gain-time statute now under attack constitutes *ex post facto* legislation.

The teaching of the cases seems to be that federal courts have been willing to find a liberty interest once a prisoner has regained his freedom even though that freedom is subject to revocation and circumscribed by conditions of parole. *Morrissey v. Brewer*, 408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972). But this Court has been generally reluctant to find a constitutionally protected liberty interest while a prisoner is still under actual confinement, *Winsett v. McGinnes*, 617 F.2d 996, 1004 (3rd Cir. 1980), *en banc*, and has done so only in those cases where a prisoner has been deprived of a valuable interest already earned without the protection of

procedural due process.

Petitioner relies heavily on *Greenfield v. Scafati*, 277 F.Supp. 644 (D.Mass. 1967), *aff'd*, 390 U.S. 713, 20 L.Ed.2d 150, 88 S.Ct. 1409 (1968), and urges that it should be controlling in the instant case (petitioner's brief, p. 53). Respondent disagrees. The result reached in *Greenfield* was based on a construction of Massachusetts law under which the availability of good conduct deductions is considered an essential element of the sentence. At the time Greenfield was sentenced, a Massachusetts statute granted him the right to earn good conduct deductions from his sentence and provided for forfeiture of good-time credits for various reasons, not including parole violations. Greenfield was released on parole and later reincarcerated for violation of

parole. Subsequent to the time Greenfield was initially sentenced, a statute was passed providing that where a prisoner had violated his parole and was returned to a correctional institution therefor, he was not to receive deductions for good-time for any of the first six months following his return. The court properly found that the statute constituted an *ex post facto* law as applied to Greenfield. *Greenfield* simply struck down a statute passed after his initial conviction which deprived parole violators of accumulated good-time upon their return to prison. There can be no question but that this statute constituted *ex post facto* legislation when applied to Greenfield because it materially altered the situation to his disadvantage. The statute struck down in *Greenfield* attached a penalty for

parole violation that was not in effect at the time of the original sentence. This had the effect of lengthening the original sentence because under Massachusetts law the availability of good conduct deductions was considered an element of the sentence. This simply isn't the situation this Court is confronted with in the instant proceeding. Under Florida law, the opportunity to earn gain-time after incarceration is no part of the original sentence imposed on a prisoner.

The Louisiana case law cited in petitioner's brief is equally inapposite. For example, *State v. Curtis*, 363 So.2d 1375 (La. 1978), and other Louisiana cases are clearly distinguishable from the issue presented *sub judice*. In *Curtis*, the court pointed out that the statute there

under attack applied a new punitive measure to the crime already consummated to the detriment or material disadvantage of the wrongdoer. The statute here under attack has no relation to sentencing and does not apply any punitive measure to a crime already consummated to petitioner's detriment or material disadvantage. As stated by the Florida Supreme Court in *Harris v. Wainwright*, 376 So.2d 855 (Fla. 1979):

> "Under either the old law or the new, gain time, whether it be what is normally considered 'statutory' or 'extra', only comes into play if a given inmate conducts himself in such a way as to deserve the gain time. Therefore, any notion of gain time can only be considered, at best, as conditionally vested."

Id. at 856. To reiterate, whatever statute was in effect at the time petitioner committed the crime for which he

was sentenced, the good-time allowances provided therein were not part of his sentence and thus not a part of the law annexed to the crime when committed. Respondent has found no authority, respectable or otherwise, holding that a prisoner has a constitutionally protected liberty interest in unearned gain-time. Petitioner has been deprived of nothing but, in fact, with the passage of the new gain-time statute, has been given the opportunity of accumulating a greater amount of gain-time than he could have done under the old statute.

CONCLUSION

The order of the Florida Supreme Court denying petition for writ of habeas corpus should be affirmed.

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APPENDIX

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944.012 Legislative intent.--The Legislature hereby finds and declares that:

(1) Florida spends each year in excess of $60 million for its state correctional system but Florida citizens have not received a fair return on that investment. Florida correctional institutions have contributed little to the reduction of crime. To the contrary, crime rates continue to rise; recidivism rates are notoriously high; and large prisons have for the most part become schools for crime, making successful reintegration into the community unlikely.

(2) It is clear that major changes in correctional methods are required. It is essential to abate the use of large institutions and continue the development of community-based corrections; to equip judges with more effective evaluative tools to deal with the criminal offender; and to provide alternatives to institutionalization, including the availability of probationers' residences and community correctional centers.

(3) One of the chief factors contributing to the high recidivism rate in the state is the general inability of ex-offenders to find or keep meaningful employment. Although 90 percent of all offenders sent to prison return to society one day, the correctional system has done little to provide the offender with the vocational skills

he needs to return to society as a productive citizen. This failure virtually guarantees the probability of return to crime. Vocational training and assistance in job placement must be looked to on a priority basis as an integral part of the process of changing deviant behavior in the institutionalized offender, when such change is determined to be possible.

(4) These changes must not be made out of sympathy for the criminal or out of disregard of the threat of crime to society. They must be made precisely because that threat is too serious to be countered by ineffective methods.

(5) In order to make the correctional system an efficient and effective mechanism, the various agencies involved in the correctional process must coordinate their efforts. Where possible, interagency offices should be physically located within major institutions and should include representatives of the Florida State Employment Service, the vocational rehabilitation programs of the Department of Health and Rehabilitative Services, and the Parole and Probation Commission. Duplicative and unnecessary methods of evaluating offenders must be eliminated and areas of responsibility consolidated in order to more economically utilize present scarce resources.

(6) It is the intent of the Legislature:

(a) To provide a mechanism for the early identification, evaluation, and treatment of behavioral disorders of adult offenders coming into contact with the correctional system.

(b) To separate dangerous or repeat offenders from nondangerous offenders, who have potential for rehabilitation, and place dangerous offenders in secure and manageable institutions.

(c) When possible, to divert from expensive institutional commitment those individuals who, by virtue of professional diagnosis and evaluation, can be placed in less costly and more effective environments and programs better suited for their rehabilitation and the protection of society.

(d) To make available to those offenders who are capable of rehabilitation the job-training and jobplacement assistance they need to build meaningful and productive lives when they return to the community.

(e) To provide intensive and meaningful supervision for those on probation so that the condition or situation which caused the person to commit the crime is corrected.

944.275 Gain-time.--

(1) The department shall grant the following deductions for gain-time on a monthly basis, as earned, from the sentence of every prisoner who has committed no infraction of the rules of the department or of the laws of the state and who has performed in a satisfactory and acceptable manner the work, duties, and tasks assigned, as follows:

(a) Three days per month off the first and second years of the sentence;

(b) Six days per month off the third and fourth years of the sentence; and

(c) Nine days per month off the fifth and all succeeding years of the sentence;

and the prisoner shall be entitled to credit for a month as soon as the prisoner has served such time as, when added to the deduction allowable, would equal a month.

(2)(a) It is the intent of the Legislature that work programs be recognized as an integral part of the rehabilitative process and that gain-time under this section be awarded only if earned as provided herein.

(b) The department is authorized to grant additional gain-time allowances on a monthly basis, as earned, up to 1 day for each day of productive or institutional labor performed by any prisoner who has committed no infraction of the rules of the department or of the laws of this state and who has accomplished

in a satisfactory and acceptable manner, the work, duties, and tasks assigned. Such gain-time allowances under this section shall be awarded on the basis of diligence of the inmate, the quality and quantity of work performed, and the skill required for performance of the work.

(c) The amount of time in a work program equivalent to 1 day shall be determined by the department. The department may provide for the award of gain-time under this subsection on a fractional basis for less than 1 day's participation in work programs.

(d) Any prisoner who, without approval, refuses or neglects to perform the work, duties, and tasks assigned in the correctional work program shall forfeit gain-time as provided in s. 944.28.

(e) The department may grant additional gain-time allowances up to 6 days per month for any inmate who, because of age, illness, infirmity, or confinement for reasons other than discipline, does not participate in a correctional work program, who demonstrates a constructive utilization of time, and who has committed no infraction of the rules of the department or the laws of the state. However, no prisoner shall receive additional gain-time credits under both paragraph (b) and this paragraph during the same month.

(3)(a) An inmate who faithfully performs the assignments given to him in a conscientious manner over and above that which may normally be expected of him, against whom no disciplinary report has been filed within the preceding 6 months, and whose conduct, personal adjustment, and individual effort towards his own rehabilitation show his desire to be a better than average inmate or who diligently participates in an approved course of academic or vocational study may be granted, on an individual basis, from 1 to 6 days per month extra gain-time to be deducted from the term of his sentence.

(b) An inmate who does some outstanding deed, such as the saving of a life or assisting in recapturing an escaped inmate, or who in some other manner performs an outstanding service that would merit the granting of additional deductions from the term of his sentence, may be granted special gain-time on the basis of from 1 to 60 days.

(4) When a prisoner is under two or more concurrent sentences, the prisoner shall be allowed gain-time as if such sentences were all one sentence; and the prisoner's gain-time, including any additional gain-time allowed under subsection (2) and extra gain-time allowed under subsection (3), shall be subject to forfeiture as though such sentences were all one sentence.

(5) No gain-time shall be awarded except as provided in this section.

944.27 Gain-time for good conduct; schedule of allowances; cumulative sentences to be treated as one sentence for purposes of allowing and forfeiting.--

(1) The [Department of Offender Rehabilitation] shall grant the following deductions for gain-time from the sentences of every prisoner who has committed no infraction of the rules or regulations of the [department], or of the laws of the state, and who has performed in a faithful, diligent, industrious, orderly, and peaceful manner the work, duties, and tasks assigned to him, to wit:

(a) Five days per month off the first and second years of his sentence;

(b) Ten days per month off the third and fourth years of his sentence; and

(c) Fifteen days per month off the fifth and all succeeding years of his sentence; and he shall be entitled to credit for a month as soon as he has served such time as, when added to the deduction allowable, would equal a month.

(2) When a prisoner is under two or more cumulative sentences, he shall be allowed gain-time as if they were all one sentence and his gain-time, including any extra gain-time allowed him under s. 944.29, shall be subject to forfeiture as though such sentences were all one sentence.

O R D E R

The Petition for Writ of Habeas Corpus is treated as a Petition for a Writ of Mandamus and is granted. The Department of Corrections is directed to compute the petitioner's gain time from July 1, 1978, under Section 944.275, Florida Statutes (Supp. 1978).

By order of the Court this 2nd day of August, A.D., 1979, Chief Judge E.R. Mills, Jr., Judge Richard W. Ervin, III and Judge Anne C. Booth.

RAYMOND E. RHODES, CLERK